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No. 58 [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1968

EDWARD SOMERVILLE,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES LAW PRINTING CO., CHICAGO, ILL. 60613 LAkeview 5-6581

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Petitioner, Edward Somerville, hereby petitions this Honorable Court for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First Judicial District, which affirmed the judgment of conviction of armed robbery, entered by the Circuit Court of Cook County, County Department-Criminal Division.

Opinion Below

The abstract of the opinion of the Appellate Court of Illinois is reported at 88 Ill.App.2d 134, 231 N.E.2d 701. The full opinion is contained in Appendix A, infra.

Jurisdiction

The judgment sought to be reviewed was entered on October 20, 1967. A timely petition to the Supreme Court of Illinois for leave to appeal was denied on Jan. 17, 1968. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1257(3).

Question presented for review

The Petitioner was denied his right to a fair trial and due process of law because of perjury committed by the chief witness for the prosecution who lied when he stated that he did not expect leniency as a result of his testifying for the prosecution; and by the prosecution deliberately creating the false impression that the witness was not promised leniency.

Statement of the case

The petitioner was convicted of the crime of armed robbery in the Circuit Court of Cook County, Illinois. He was sentenced to the Illinois State Penitentiary for a term of not less than ten years nor more than twenty years. While his appeal to the Appellate Court of Illinois was pending, he filed a motion for new trial in the trial court. That motion is as follows (Add. Ab. 1-4):

Motion for New Trial

Comes now Edward Somerville, defendant, by his attorney, Julius Lucius Echeles, and respectfully moves the court for a new trial on the grounds of newly discovered evidence, and states as follows:

1. That he was convicted of the crime of robbery before a jury, sentenced to ten to twenty years, in a trial which commenced on November 16, 1965 (Tr. of Pr. 1). His conviction was the product of testimony by one, Leon K. Arnold, which testimony was uncorroborated as to the fact of defendant's participation in the robbery. Arnold testified he was an accomplice robber with defendant (Tr. of Pr. 36-160).

2. Defendant took the stand, testified, and denied the accusation of Arnold (Tr. of Pr. 290-347).

3. Accordingly, the issue at the trial was the credibility of Arnold as against the credibility of defendant. Arnold had been indicted for the offense in March, 1964, and as of trial time, November 16, 1965, Arnold had not pled guilty, nor was there any other disposition made of his case—even as of the date of this motion. On direct testimony when he was being examined by the prosecutor, the following occurred:

"Mr. Tuite (Assistant State's Attorney): Q. Mr. Arnold, have you ever been convicted of any felony in this state or any state in this country?

The Witness: A. No, sir.

Q. And prior to your giving testimony in this case, have there been any promises made to you by the State's Attorney's office or by any police force in this county?

A. No, sir." (Tr. of Pr. 80-81).

4. Arnold testified subsequently in the matters relating to the instant case in a trial commencing March 7, 1966, in *People* v. *Donald Somerville and Marjorie Kullerstrand,* indictment No. 65-3017, (presently on appeal to the Appellate Court of Illinois, First District, No. 51415). In that case, however, during cross-examination regarding the same matters to which Arnold had testified in the trial against the instant defendant, the following occurred:

"Q. Did the Sheriff's police tell you that you would probably benefit by telling the truth?

A. I expected leniency if that's what you mean.

Q. You expected leniency?

A. Yes, sir.

Q. From the Sheriff's police?

A. Yes, sir.

Q. You expected the Sheriff's police to be able to help you, is that right?

A. Yes, sir.

Q. And they told you to come to the State's Attorney's office?

A. Yes, sir.

Q. And is that the first time you met Mr. Tuite?

A. Yes, sir." (Tr. of Pr. 137).

* * * *

"Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?

A. I don't understand what you mean?

Q. You are having difficulty?

A. Yes.

Q. You wanted to help yourself, is that right?

A. Yes.

Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?

A. Yes.

Q. Did he say that he could help you?

A. *He said I could probably get leniency.*

Q. He told you, you would get leniency, is that right, and you don't expect leniency, is that right?

A. No, I don't expect leniency, I hope for it." (Tr. of Pr. 138).

5. In *People* v. *Hoskins*, 25 Ill. 2d 333, 185 N.E. 2d 214 (1962), the Supreme Court stated (185 N.E. 2d at 216):

"Where there has been a knowing use of perjured testimony, that fact will not ordinarily appear from the record made at the trial. The relevant evidence is, therefore, put before a trial court in some form of post trial proceeding. (See e.g. *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.ed. 2d 1217 (post-conviction hearing); *Kyle* v. *United States* (Second Cir. 1961) 297 F.2d 507 (motion under 28 U.S.C.A. 2255); *United States ex rel. Hamilton* v. *Maroney* (W.D. Pa. 1960) 184 F. Supp. 721 (habeas corpus); *People* v. *Savvides* (1956) 1

N.Y. 2d 554, 154 N.Y.S. 2d 885, 136 N.E. 2d 853 (motion for a new trial) . . . It is hard to see how the two contradictory statements upon which the defendant relies can be so reconciled as to avoid the force of his contention."

6. Accordingly, because the prosecutor knew of the perjured testimony of Arnold at the time it was presented in the case at bar, this court should grant a hearing, and upon such hearing, receive evidence and thereupon order a new trial.

In response to the motion for new trial, the State filed a motion to dismiss which reads as follows (Add. Ab. 4-5):

Now comes John J. Stamos, State's Attorney of Cook County, by Matthew J. Moran, Assistant State's Attorney and moves to dismiss defendant's Motion for a new trial for the following reasons:

1. The defendant was convicted of robbery in November 1965, and a review of that conviction is now pending before the Appellate Court of Illinois, First District. Jurisdiction over this case is therefore in the Appellate Court and not in the trial court.

2. The Appellate Court of Illinois, First District, has denied the defendant's Motion to stay all appellate proceedings so that he may seek relief from the trial court.

3. The defendant is free on an appeal bond and does not fulfill the statutory requirements for post-conviction relief—Illinois Revised Statutes 1965, Chapter 38, Section 122-1.

Wherefore, the People pray this Honorable Court dismiss the defendant's Motion.

The petitioner thereupon answered the motion to dismiss (Add. Ab. 5-6):

1. Athough defendant's appeal from his conviction in this court is presently pending before the Appellate Court, that court cannot entertain motions for a new trial based on matters discovered after the trial in the instant cause.

2. Although the Appellate Court refused to stay all appellate proceedings pending application for relief from the trial court, it did not state—implicitly or explicitly—that defendant could not seek relief in the trial court.

3. Defendant does not seek relief by way of post-conviction. He seeks relief by way of motion for a new trial on the grounds of new evidence not available to him at the time of his trial, to-wit: the perjury of the State's chief witness, such perjury being known to the prosecutor. Section 122-1, Chapter 38, Illinois Revised Statutes, 1965, referred to by the State in paragraph 3 of its Motion to Dismiss, relates only to Post-Conviction hearings. It does not relate to new trial motions based on newly discovered evidence. In any event, a proceeding to attack a conviction on constitutional grounds may be made at any time, before a defendant commences serving of his sentence, during the serving of his sentence or even after the sentence has been served completely. *United States* v. *Morgan,* 346 U.S. 502, 98 L.ed.2d 248.

The trial court denied the motion for new trial (Add. Ab. 6) and the Appellate Court considered the proposition raised in the motion for new trial and disposed of it in the following manner:

"Defendant is in error in attempting to equate the words "He said I could probably get leniency" with the making of a definite promise. It is clear that leniency was a mere expectation on Arnold's part; there is not one word in the above testimony of any promise having been made that Arnold would get leniency if he testified for the State. Furthermore, there is no indication that the conversation with regard to leniency between Arnold and the prosecuting attorney did not occur within the five months between the trial in the instant cause and the trial from which the above testimony was excerpted. It should also be noted that the question of leniency goes to the credibility of Arnold as a witness and that the jury was presented with a great deal of evidence that Arnold testified as he did due to a grudge he held against defendant; the jury nevertheless chose to believe Arnold's testimony hich was corroborated by the other witnesses for the State.

"The cases of Napue v. Illinois, 360 U.S. 264, and People v. Agnello, 35 Ill. 2d 611, so heavily relied upon by defendant in support of his position are not in point. In each of these cases the witness testified there had been no promise made to him by the State in consideration for his evidence, whereas there had in fact been a promise of consideration made and the prosecuting attorney knew of the promise during the questioning. This is not the situation in the instant cause."

Reasons for Granting Writ

The prosecution deliberately created the false impression that the chief witness for the prosecution, one Leon K. Arnold, an accomplice witness, was not promised nor had expectation of leniency because of his giving testimony favorable to the prosecution.

On direct examination by the prosecutor, the witness Arnold was questioned as follows by Mr. Tuite, the assistant state's attorney (additional Abs. 2):

> Mr. Tuite: Q. Mr. Arnold, have you ever been convicted of any felony in this State or any State in this country?
>
> The Witness: A. No, sir.
>
> Q. And prior to your giving testimony in this case, have there been any promises made to you by the State's Attorney's office or by any police force in this county?
>
> A. No, sir.

In a trial of a companion case, Arnold again testified and this time was questioned and gave the following answers (additional Abs. 3):

> Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?
>
> A. I don't understand what you mean.
>
> Q. You are having difficulty?
>
> A. Yes.
>
> Q. You wanted to help yourself, is that right?
>
> A. Yes.
>
> Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?
>
> A. Yes.

Q. Did he say that he could help you?
A. He said I could probably get leniency.
Q. He told you, you would get leniency, is that right, and you expect leniency, is that right?
A. No. I don't expect leniency, I hope for it.

We must also here made note of one aspect of the Appellate Court's disposition of this question. The Court indicated that there was no showing as to when the conversation between Tuite and Arnold took place, and therefore, the promise might have come since the trial of Edward Somerville. This must be patently false because the record is clear that the promise was made the first time Arnold met Tuite which would have had to have been before the trial of Edward Somerville.

It is obvious that the prosecutor's questions to Arnold in the instant case were meant to create the impression that Arnold had had no conversations with anyone in the State's Attorney's office or with any police officer in which the matter of leniency was discussed. To the contrary, however, there had been conversations in which the very Assistant State's Attorney who questioned Arnold had told him that he could probably get leniency.

Thus the case involves a question which goes even beyond *Napue* v. *Illinois*, 360 U.S. 264, in which it was held that a conviction must fall when the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears. There is here involved the proposition announced by Justice Brennan and concurred in by Chief Justice Warren and Justice Douglas in the case of *Giles* v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793, that there is a constitutional duty on the part of the prosecution to disclose all evidence admissible and useful to the defense.

The proposition referred to above from the plurality opinion in Giles was admittedly never adopted by the Supreme Court and only accepted in the concurring opinion of Mr. Justice Fortas, 386 U.S. 66, 87 S.Ct. 793, 808, 809. Justice Fortas said:

> I do not agree that the State may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that it would not be admissible at trial. The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.

The action of the prosecution is barred even by the rules discussed in Justice Harlan's dissent in the *Giles* case, 386 U.S. 66, 87 S.Ct. 793, 811. There he analyzed prior cases dealing with the State's duty to disclose evidence:

> * * * The evidence with which the plurality is concerned therefore cannot 'reasonably be considered admissible,' *Griffin* v. *United States,* 87 U.S. App. B.C. 172, 175, 83 F.2d 990, 993, under the law of Maryland. Far more important from a Federal standpoint, evidence of Foster's relations with the girl, even if admissible, could not have been substantially relevant to the principal factual issues at the trial. Its omission did not discolor the meaning of controlling facts, as did the episode involved in *Alcorta* v. *State of Texas,* 355 U.S. 23, 78 S.Ct. 103, 2 L.Ed. 2d 9; nor did it measurably strengthen a witness' credibility, as did the one involved in *Napue* v. *People of the State of Illinois,* 360 U.S. 264, 79 S.Ct. 1173.

Paraphrasing Justice Harlan's dissent, evidence in this case that Tuite had told Arnold that he (Arnold), "could probably get leniency." was admissible it did discolor the meaning of controlling facts, *i.e.* Arnold's credibility; and its omission measurably strenthened the witness Arnold's credibility. Furthermore, there is no question that such evidence was admissible.

Under all of these circumstances, the defendant-petitioner was denied due process of law because of the State's withholding relevant evidence which would have had great bearing upon the question of the defendant's guilt.

Conclusion

For the above and foregoing reasons a Writ of Certiorari ought to issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this case.

Respectfully submitted,

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